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NOTE

Are You My Mother? Missouri Denies Custodial Rights to Same-Sex Parent

White v. White, 293 S.W.3d 1 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

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I. INTRODUCTION

Who should qualify as a parent? Courts have grappled with this question for decades. To one court, “[t]he best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate Public authorities cannot improve on nature.”¹ Yet in a country where nearly four out of ten babies are born outside of wedlock,² approximately ten million children are raised by same-sex parents,³ and about forty to forty-five percent of all marriages end in divorce,⁴ few children are born to two committed, biological parents who raise their child together. Faced with this reality, some courts have allowed third parties to establish custody and assert parental rights through alternative doctrines to traditional parentage, such as *de facto*, *in loco*, and equitable parentage.⁵

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1. Lindsay J. Rohlf, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define “Parent”?*, 94 IOWA L. REV. 691, 693 (2009) (quoting *In re K.D. (A Minor) (Ward: Termination of Access)*, [1988] A.C. 806, 812 (H.L.) (appeal taken from Eng.) (U.K.) (opinion of Lord Templeman)).

2. The Associated Press, *Nearly 4 in 10 U.S. Babies Born Out of Wedlock*, MSNBC, Nov. 21, 2006, www.msnbc.msn.com/id/15835429/.

3. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 342 (2002); Valerie Kellogg, *How the Children of the Gay Baby Boom Are Faring*, NEWSDAY, July 10, 2001, at B10.

4. David Crary, *U.S. Divorce Rate at Lowest Level Since '70*, CHI. TRIBUNE, May 11, 2007, at C5.

5. See *infra* Part III.C.

However, these alternative doctrines remain controversial and not all states have adopted or applied them in the same way.⁶

Recently, the Missouri Court of Appeals, Western District held that a nonbiological parent lacked rights to the child of her former lesbian partner in *White v. White*.⁷ The same-sex parents planned the pregnancy together, shared the costs, and jointly raised the child.⁸ Yet, without a biological contribution or a marriage license recognized by the state, the court refused to grant the plaintiff parental rights.⁹

This Note argues that Missouri should adopt a doctrine of alternative parentage that expands the definition of “parent” to include those in same-sex relationships who are not the biological or adoptive parents.¹⁰ In Part II, this Note analyzes the facts and holding of *White*. Next, in Part III, this Note explores the Uniform Parentage Act and introduces the nontraditional forms of standing created by courts to allow third parties to obtain custody rights. Then, Part IV examines the court’s rationale in *White*. Lastly, Part V explores why the court erred in its decision and why courts should recognize alternative forms of parentage. This Note concludes that by refusing to recognize the rights of same-sex parents, Missouri courts not only discriminate against gay parents, but they also discriminate against their children by refusing to recognize their rights to two legal parents.

II. FACTS AND HOLDING

In 1997, Leslea White and Elizabeth Michelle Crowe (Michelle) entered into a committed, intimate, same-sex relationship that exhibited many of the same characteristics as that of a heterosexual couple.¹¹ From the beginning of the relationship, the couple discussed having children and agreed to raise them together.¹² Leslea claimed that before the birth of their children, she

6. See *infra* Part III.C.

7. 293 S.W.3d 1, 25 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

8. See *id.* at 6.

9. *Id.* at 25.

10. Missouri currently defines “parent” as:

[A] biological or adoptive parent, including a presumed or putative father. The word parent shall also include any person who has been found to be such by: (a) A court of competent jurisdiction in an action for dissolution of marriage, legal separation, or establishment of the parent and child relationship; (b) The division under section 454.485; (c) Operation of law under section 210.823, RSMo; or (d) A court or administrative tribunal of another state.

MO. REV. STAT. § 454.440(6) (2000).

11. *White*, 293 S.W.3d at 6.

12. Appellants’ Brief at *5, *White v. White*, 293 S.W.3d 1 (Mo. App. W.D. 2009) (No. WD 69580), 2008 WL 4143932.

and Michelle agreed that together they would raise and support any children born during their relationship.¹³ Leslea alleged that this understanding continued throughout the relationship.¹⁴

Subsequently, both women conceived a child by artificial insemination through the donation of the same anonymous sperm donor.¹⁵ According to Leslea, the couple chose to conceive in this manner in order to create a biological bond between themselves and their children, in addition to the psychological bond that they hoped would develop by raising the children together.¹⁶ In this way, Michelle gave birth to C.E.W. on December 15, 2001, and Leslea gave birth to Z.A.W. on July 27, 2004.¹⁷ The women shared the costs of the inseminations, pregnancies, and births.¹⁸ Leslea also asserted that they attended the pregnancy-related medical appointments together and supported each other during the births, including cutting each other's umbilical cord.¹⁹ Additionally, on September 12, 2002, after the birth of the couple's first child, Leslea claimed that Michelle legally changed her last name from Crowe to White so that all of the members of the family would share the same last name.²⁰

The women's relationship lasted eight years.²¹ During that time, they moved in together and raised the children as siblings.²² The children called Leslea "Mommy" and Michelle "Mama."²³ After the women separated in November 2005, they voluntarily shared custody of the children.²⁴ However, in late May 2006, Michelle unilaterally terminated this arrangement against Leslea's wishes.²⁵ She refused to allow C.E.W. to have any contact with Z.A.W. or Leslea.²⁶ She would not accept money for C.E.W. from Leslea, stopped having any contact with Z.A.W., and refused to contribute financially to Z.A.W.'s welfare.²⁷

As a result, on January 18, 2007, Leslea filed a petition for declaration of maternity, order of custody, and order of child support on her own behalf and as next friend for minors C.E.W. and Z.A.W. in the Circuit Court of

13. *White*, 293 S.W.3d at 23.

14. *Id.*

15. *Id.* at 6.

16. Appellants' Brief, *supra* note 12, at *7.

17. *White*, 293 S.W.3d at 6.

18. Appellants' Brief, *supra* note 12, at *5-6.

19. *Id.* at *5-7.

20. *Id.* at *6.

21. *Id.* at *2, *5.

22. *Id.*

23. *Id.* at *6.

24. *Id.* at *7; *see also White v. White*, 293 S.W.3d 1, 6 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

25. *White*, 293 S.W.3d at 6; *see also* Appellants' Brief, *supra* note 12, at *7.

26. *White*, 293 S.W.3d at 6; *see also* Appellants' Brief, *supra* note 12, at *7.

27. *White*, 293 S.W.3d at 6.

Boone County, Missouri.²⁸ Leslea claimed that the children were deprived of the care of two parents and the companionship of one another.²⁹ Her petition also stated that neither child has a natural or presumed father.³⁰ As a result, she asked the court to find both women the legal parents of the children and award joint legal and physical custody.³¹ Additionally, she asked the court to order both women to pay child support.³² In the alternative, if the court ruled against joint legal and physical custody, Leslea asked for primary physical custody of the children and visitation rights for Michelle.³³

In response, Michelle filed a motion to dismiss Leslea's petition for both lack of standing and failure to state a claim upon which relief could be granted.³⁴ In her motion, Michelle claimed that Leslea had no standing under the Missouri Uniform Parentage Act (the MoUPA) because C.E.W. is not Leslea's biological child.³⁵ She further argued that no statute enables a non-biologically related female to claim maternity rights to a child.³⁶ Additionally, Michelle claimed that since the MoUPA, as the "exclusive means" of establishing parentage in Missouri, does not acknowledge the creation of a *de facto*, equitable, or psychological parent-child relationship, the terms are inapplicable.³⁷ In response, Leslea argued that as an "interested party," she had standing under the MoUPA, which would allow the court to exercise *parens patriae* authority by finding Michelle and Leslea to be *de facto* parents to Z.A.W. and C.E.W.³⁸ In the alternative, Leslea claimed that she could also have standing as a third party through the common law "exceptional circumstances" doctrine.³⁹

28. *Id.*

29. Appellants' Brief, *supra* note 12, at *2.

30. *White*, 293 S.W.3d at 6.

31. *Id.*

32. *Id.*

33. *Id.* at 6 n.2. Leslea claimed that she was not trying to terminate Michelle's physical custody of C.E.W. *Id.* Rather, she claimed she wanted to share custody of the child. *Id.*

34. *Id.* at 6.

35. *Id.* at 6-7.

36. *Id.* at 6.

37. *Id.* at 7.

38. *Id.*

39. *Id.* The exceptional circumstances doctrine applies when "exceptional circumstances" may warrant a grant of custody or visitation to a third party even where the biological parent is not unfit." *Id.* at 17. Additionally,

the presumption which favors vesting of custody in the natural parent must fall whenever the best interests of the child, for some special or extraordinary reason or circumstance, mandate that custody be vested in third persons, regardless of whether the evidence establishes the unfitness or incompetence of the natural parent.

Id. at 18 (quoting *In re K.K.M.*, 647 S.W.2d 866, 890 (Mo. App. E.D. 1983)).

After Leslea filed her petition, a family court commissioner of the Circuit Court of Boone County appointed a guardian ad litem to represent the children.⁴⁰ After holding several hearings, the family court commissioner denied Michelle's motion to dismiss.⁴¹ Michelle was granted a rehearing before a family court judge, who dismissed Leslea's petition without prejudice and without indicating a reason for the ruling.⁴²

Leslea conjectured that the court dismissed her claim for lack of standing and failure to state a claim.⁴³ She filed ten points on appeal with the Missouri Court of Appeals, Western District.⁴⁴ Applying de novo review, the Missouri Court of Appeals, Western District affirmed the trial court's decision and dismissed Leslea's petition, reasoning that (1) Leslea lacked stand-

40. *Id.* at 7.

41. *Id.*

42. *Id.*

43. See Appellants' Brief, *supra* note 12, at *9, *12-13.

44. *White*, 293 S.W.3d at 7. See generally Appellants' Brief, *supra* note 12. Two amicus curiae briefs were filed with the court in support of Leslea and the children's claims. *White*, 293 S.W.3d at 7 n.4. The first was filed by the National Association of Social Workers and the National Association of Social Workers, Missouri Chapter, and the second was filed by the American Civil Liberties Union of Eastern Missouri, the American Civil Liberties Union of Kansas and Western Missouri, and the American Civil Liberties Union Lesbian, Gay, Bisexual, Transgender & Aids Project. *Id.* Ten points were listed in the appellate brief: (1) Leslea and both children have standing under MoUPA sections 210.826.2 and 210.848; (2) the circuit court erred by failing to "exercise its *parens patriae* responsibility to apply common law and equitable principles to safeguard the best interests of children raised in diverse family structures"; (3) "the circuit court erred in dismissing the petition because Leslea is the *de facto* parent of C.E.W. and Michelle is the *de facto* parent of Z.A.W. in that the women consented to and fostered reciprocal parent-child relationships with the children"; (4) "Leslea stands *in loco parentis* to C.E.W. and Michelle stands *in loco parentis* to Z.A.W. in that the women held themselves and each other out to the world as the parents of both children"; (5) "[Michelle] is equitably estopped from denying that the parent-child and sibling relationships in this family are entitled to legal protection in that appellee encouraged and fostered the family relationships on which appellants relied"; (6) "[Leslea] has standing and states a claim for third party custody and visitation under the exceptional circumstances doctrine"; (7) "[Leslea and the children] have standing and state claims for relief in that the interests of children conceived through anonymous donor insemination in maintaining an ongoing relationship with and support from their second intended parent are entitled to protection from the courts"; (8) the court deprived Leslea and the children of their rights to due process; (9) dismissal "deprived [Leslea and the children] of their rights to equal protection . . . in that [they] were deprived on the basis of legitimacy, sexual orientation, and sex of family protections and support available to other Missouri families"; and (10) "dismissal of the petition unconstitutionally deprived appellants of their rights under Missouri's open courts guarantee . . . in that appellants were denied the opportunity to petition the court to enforce legal protections for their parent-child relationships." Appellants' Brief, *supra* note 12, at *15-66.

ing under the MoUPA, the alternative parent doctrines, and equitable estoppel; (2) her claim did not fall under the exceptional circumstances doctrine or a contractual assumption made by the parties; and (3) she had no constitutionally valid claims under due process, equal protection, or the open courts guarantee.⁴⁵

III. LEGAL BACKGROUND

Traditionally, courts afforded only biological parents legal rights to custody of a child.⁴⁶ However, as the number of traditional families dwindles, states and governmental entities create flexible laws and theories to adapt to these changes.⁴⁷ The Uniform Parentage Act (UPA) promulgated the theory that parental rights should arise from the relationship between the parent and child, rather than the relationship between the parents.⁴⁸ Although Missouri adopted a majority of the UPA, the state's courts do not consider the UPA the "exclusive method for determining paternity";⁴⁹ even so, they have yet to adopt other nontraditional theories to resolve cases where two same-sex individuals assert parentage.⁵⁰

A. *Beginning with Biology*

The Supreme Court has ruled that the Fourteenth Amendment of the United States Constitution protects a biological parent's right to custody of his or her children.⁵¹ In fact, a parent's custody right is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]."⁵²

However, as a result of the increased rate of divorce, the disintegration of the nuclear family, and the increase in same-sex parentage, children today are less likely to live with two biological parents.⁵³ Thus, the scope of protection that the Supreme Court grants to custodial rights has become increasingly important. According to some, Supreme Court precedent suggests that a parent's right to custody is determined more by the parent's relationship with

45. *White*, 293 S.W.3d 1.

46. *See infra* Part III.A.

47. Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 706-25 (1986).

48. *See* UNIF. PARENTAGE ACT § 102(14) (amended 2002).

49. *White*, 293 S.W.3d at 10, 12 (citing *In re Marriage of Fry*, 108 S.W.3d 132, 136 (Mo. App. S.D. 2003)).

50. *See infra* Part III.C.

51. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also* Haynie, *supra* note 47, at 726.

52. *In re N.N.E.*, 752 N.W.2d 1, 8-9 (Iowa 2008) (alteration in original) (quoting *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001)).

53. *See* Haynie, *supra* note 47, at 705; *see also supra* notes 2-4 and accompanying text.

the child than by the parent's biological tie to the child.⁵⁴ Yet, the Supreme Court has never identified the custody rights of a third-party parent in a same-sex relationship.⁵⁵

Even if third parties continue to gain more custodial rights and courts focus on child-parent relationships, "the genetic bond of parenthood continues to remain a central theme for redefining family relationships."⁵⁶ State and federal courts have frequently placed children with their formerly absent biological fathers and mothers over third parties who cared for the children and developed deep relationships with them.⁵⁷ Courts have also maintained that a child can only have two legal parents, regardless of whether more than two individuals are able to assert standing as parents.⁵⁸ Overall, third-party custody rights remain a highly contested issue in both state and federal courts.

54. *See id.* at 736; *see also, e.g.,* Michael H. v. Gerald D., 491 U.S. 110 (1989) (noting the importance of the father's cohabitation with the mother and his desire to raise the child as his own); *Lehr v. Robertson*, 463 U.S. 248 (1983) (noting putative father had never established relationship with his child).

55. Haynie, *supra* note 47, at 728.

56. Philip F. Schuster II, *Constitutional and Family Law Implications of the Sleeper and Troxel Cases: A Denouement for Oregon's Psychological Parent Statute?*, 36 WILLAMETTE L. REV. 549, 569 (2000).

57. *See, e.g., In re Doe*, No. T11CP03011510A, 2006 Conn. Super. LEXIS 634 (Conn. Super. Ct. Feb. 28, 2006) (court refused to terminate the mother's rights, even though her seven-year-old son had "been cared for by his [foster parent] for more than thirty months and ha[d] grown accustomed to a stable home and family"); *Hutchinson v. Hutchinson*, 649 P.2d 38 (Utah 1982) (trial court awarded custody of all three children to the father because the mother was a heavy drinker and had neglected them in the past, but the state supreme court reversed the decision and remanded the case to determine the custody rights of the eldest child because, although the father might have been a more fit parent, he was not biologically related).

58. Deborah H. Wald, Esq., *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 381, 406 (2007) (citing *Georgina G. v. Terry M.*, 516 N.W.2d 678, 684-85 (Wis. 1994) (court denied a lesbian the right to adopt her partner's biological child because even though the court found the adoption was in the best interests of the child, the rights of both biological parents had not been terminated, the child's best interests in an adoption is not a protected liberty, and the child could still have a relationship with her mother's partner).

B. *The Uniform Parentage Act*

The Uniform Parentage Act was first introduced in 1973 by the National Conference of Commissioners on Uniform State Laws.⁵⁹ Since then, almost half of the states have adopted the UPA in full, and many more states have drafted laws congruous with the Act.⁶⁰

The UPA stresses the importance of the relationship between the child and the parent, rather than the relationship between the parents.⁶¹ For example, a 2000 revision to the Act defined a parent-child relationship as “the legal relationship between a child and a parent of the child.”⁶² Since a “legal relationship” can be established in ways other than biology,⁶³ “the Act broadens the scope of whose parental status can reasonably be adjudicated.”⁶⁴ In this way, the Act stresses the rights of all caregivers, regardless of biological ties, to be deemed parents under the law. The revision also permits men to establish paternity rights through nontraditional mechanisms such as putative father registries.⁶⁵

The UPA was further amended in 2002 to recognize lesbian women who use assisted reproductive technology to conceive as the legal parents of the child.⁶⁶ Additionally, section 106 of the Act allows courts to use a means of establishing paternity to instead create maternity.⁶⁷ Thus, the paternity section applies equally to women and can be relied upon by women. Finally, the UPA promotes equality by rejecting the distinction between the legitimacy and illegitimacy of a child; the Act treats children born outside of marriage in the same way as children from traditional families.⁶⁸ In these ways, the UPA

59. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 129 (2006).

60. *Id.*

61. Jenny Wald, *Legitimate Parents: Construing California's Uniform Parentage Act to Protect Children Born Into Nontraditional Families*, 6 J. CENTER FOR FAM. CHILD & CTS. 139, 141 (2005), available at http://www.courtinfo.ca.gov/programs/cfcc/pdf/files/10_Wald.pdf.

62. UNIF. PARENTAGE ACT § 102(14) (amended 2002).

63. *Id.* §§ 102(14), 201.

64. Jacobs, *supra* note 3, at 370.

65. Meyer, *supra* note 59, at 129; *see also* UNIF. PARENTAGE ACT §§ 204, 301-02.

66. UNIF. PARENTAGE ACT §§ 701-707 (article 7); Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171, 177 (2008).

67. UNIF. PARENTAGE ACT § 106; *see also* Althouse, *supra* note 66, at 177.

68. Meyer, *supra* note 59, at 129-30; *see also* UNIF. PARENTAGE ACT § 202. This 2002 amendment was made in order to rectify the complaint that children of married parents were treated differently than those of an unmarried couple and because of the complaint that children of same-sex parents were completely ignored by

continues to adapt to the changing structure of the family in a quest to benefit children and promote equality.

Missouri adopted a majority of the UPA in 1987,⁶⁹ and the applicable provisions span the Missouri Revised Statutes from sections 210.817 through 210.854.⁷⁰ This has significantly changed the way parentage can be established in Missouri. Sections 210.824, 210.826, and 210.848 are some of the most significant and are discussed below.

1. Missouri Revised Statute Section 210.824

Although Missouri adopted a majority of the UPA, it resisted the 2002 revision regarding assisted reproductive technology and lesbian couples.⁷¹ As a result, the only Missouri statute that deals with assisted reproductive technology is section 210.824, which allows the husband of a woman who is inseminated with semen from another man to be considered the natural father of the child if the husband consents to the procedure in writing.⁷² Thus, Missouri statutes do not expressly allow both women in a lesbian relationship to be considered the parents of a child conceived through assisted reproductive technology. As a result, under Missouri law, the legal parentage of two females must be established through nontraditional, judicially created forms of standing asserting parental or custodial rights. As explained below, however, Missouri has not yet adopted any of the alternative doctrines that protect the rights of same-sex parents and their children.

the previous act. John J. Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 FAM. L.Q. 1, 2 (2003).

69. *White v. White*, 293 S.W.3d 1, 10-11 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009); S. 328, § 7 (Mo. 1987).

70. MO. REV. STAT. §§ 210.817-.854 (2000).

71. *See* UNIF. PARENTAGE ACT §§ 701-707; *see also* Tim R. Schlesinger, *Assisted Human Reproduction: Unsolved Issues in Parentage, Child Custody and Support*, 61 J. MO. B. 22, 23 (2005).

72. MO. REV. STAT. § 210.824 states:

(1) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. . . . (2) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

See also Schlesinger, *supra* note 71, at 23.

2. Missouri Revised Statute Section 210.826

Missouri Revised Statute section 210.826, which incorporates the UPA, includes a variety of ways to determine if a father-child relationship exists.⁷³ If a child has a presumed father, an action to determine whether a father exists can be brought by the child, the child's mother, the family support division, a man alleging that he is the father, any person who has physical or legal custody of the child for more than sixty days, or the presumed father.⁷⁴ A man is presumed to be the father if (1) he and the child's mother are or were married and the child was born within three hundred days after the marriage ended; (2) he and the child's mother attempted to marry each other, but the marriage was invalid; (3) after the child was born, he and the mother married or attempted to marry each other and he acknowledged his paternity; or (4) an expert determines that he is the actual father through DNA tests.⁷⁵

If a child has no presumed father, an action to determine the existence of a father can be brought by a variety of parties, including

the child, the mother or person who has legal custody of the child, any person having physical or legal custody of a child for a period of more than sixty days, the family support division, the personal representative or a parent of the mother if the mother has died, a man alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.⁷⁶

This statute allows for quicker determinations of parental rights. If it is determined that the child has no father, the child can be adopted or placed into a permanent home.⁷⁷ This increases the opportunity for the child to find a permanent home rather than wait in limbo while the court determines if a father exists. If a father does exist, then it is required by law that he or the court terminates his parental rights before the child can be adopted.⁷⁸

Although the MoUPA contains sections devoted to the adjudication of paternity, the Missouri Court of Appeals, Southern District found in *In re Marriage of Fry* that the UPA is not "the exclusive method for determining paternity."⁷⁹ In *Fry*, the wife filed for divorce, and the husband claimed he

73. MO. REV. STAT. § 210.826 (Supp. 2009).

74. *Id.* § 210.826.1.

75. MO. REV. STAT. § 210.822 (2000).

76. MO. REV. STAT. § 210.826.2 (Supp. 2009).

77. MO. REV. STAT. § 453.110 (Supp. 2009) (requiring the termination of parental rights before transfer of custody can occur).

78. *Id.*

79. 108 S.W.3d 132, 136 (Mo. App. S.D. 2003).

was not the father of the child born during their marriage.⁸⁰ The parties agreed on genetic testing to determine the child's father.⁸¹ The attorney failed to set up the genetic testing and also failed to advise the husband when the next hearing was to take place.⁸² The attorney withdrew, and the trial court entered a judgment determining the husband to be the father, even though the genetic testing never took place.⁸³

On appeal, the husband argued that the trial court failed to determine paternity in accordance with the MoUPA and, thus, that the judgment should be overturned.⁸⁴ The Missouri Court of Appeals, Southern District agreed with the husband and reversed the judgment, finding that paternity should be determined in accordance with the MoUPA.⁸⁵ However, the appellate court determined that the MoUPA cannot be the "exclusive method for determining paternity in Missouri."⁸⁶ The court reached this conclusion because the legislature previously added the MoUPA's definition section, section 210.817, to the UPA provisions related to the Uniform Reciprocal Enforcement of Support Law (URESA) and the Uniform Interstate Family Support Act (UIFSA) determinations of paternity.⁸⁷ In doing so, the legislature noted that "no other provisions of [the UPA] shall apply in such actions."⁸⁸ Even so, the court stated that in the vast majority of cases, the MoUPA should "be applied as uniformly and universally as is appropriate" because its goal is to provide an overarching mechanism to determine parentage.⁸⁹ Furthermore, the court found that the MoUPA should be used when parentage is at issue and no other provision, other than the MoUPA, seems to apply.⁹⁰ As a result, Missouri courts implement the MoUPA whenever possible.⁹¹

3. Missouri Revised Statute Section 210.848

The MoUPA allows a variety of parties to bring an action to determine paternity; similarly, "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship."⁹² Additionally, the provisions that apply to the father-child relationship also apply to

80. *Id.* at 134. The husband's claim arose after he learned of his wife's infidelity. *Id.*

81. *Id.*

82. *Id.* at 134-35.

83. *Id.* at 134.

84. *Id.* at 135.

85. *Id.* at 138.

86. *Id.* at 135.

87. *Id.* at 135-36.

88. *Id.*

89. *Id.* at 136.

90. *Id.*

91. *E.g., id.*

92. MO. REV. STAT. § 210.848 (2000).

the mother-child relationship.⁹³ Since the UPA authors did not envision many disputes arising concerning mother-child relationships, they did not rewrite the paternity provisions to include maternity, as they were “already complex.”⁹⁴ Although this is understandable, it gives judges more discretion in determining how the paternity statutes apply to maternity.⁹⁵ This statute, like Missouri Revised Statutes section 210.826, serves to hasten the placement of a child into a permanent home, which requires the relinquishment of both parent’s rights.⁹⁶

C. Alternative Parentage Doctrines

In addition to the UPA, some courts have begun to permit nonbiological parents to establish legal relationships with children under nontraditional theories such as *in loco parentis*, *de facto* parentage, and equitable parentage.⁹⁷ These alternative forms of parentage have allowed nonbiological same-sex parents, who would otherwise be without rights, to protect their custody rights. Although Missouri courts have considered and applied some of these theories in a few cases, they have not applied any of the theories to same-sex couples asserting third-party rights to parentage. Each separate theory and its application in Missouri are discussed below.

1. De Facto Parentage

Some states have extended parental rights to nontraditional parent-child relationships through the doctrine of *de facto* parentage.⁹⁸ A *de facto* relationship exists between a child and parent when the relationship is unable to

93. *Id.*

94. Missouri Revised Statutes section 210.848 is based on the Uniform Parentage Act Section 21. The comment to section 21 states:

Since it is not believed that cases of this nature will arise frequently, Sections 4 to 20 are written principally in terms of the ascertainment of *paternity*. While it is obvious that certain provisions in these Sections would not apply in an action to establish the mother and child relationship, the Committee decided not to burden these – already complex – provisions with references to the ascertainment of *maternity*. In any given case, a judge facing a claim for the determination of the mother and child relationship should have little difficulty deciding which portions of Sections 4 to 20 should be applied.

UNIF. PARENTAGE ACT § 21 cmt. (amended 2002).

95. UNIF. PARENTAGE ACT § 21 cmt.

96. MO. REV. STAT. § 453.110 (Supp. 2009) (either the court or the parents must terminate the existing parental rights before a child can be adopted).

97. See *infra* Part III.C.1-3.

98. Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177, 188-93 (1991).

conform to traditional conceptions of parentage, yet the relationship exists nevertheless.⁹⁹ It is founded on psychological, rather than legal, theories.¹⁰⁰ A person asserting a custodial right through *de facto* parentage acts as the parent and considers himself or herself the child's parent in all ways except that which falls within the legal definition of parentage.¹⁰¹ In order to claim *de facto* status, the "biological stranger" must have (1) acted as a parent by taking responsibility for the child's care, education, and development; (2) lived with the child; (3) bonded with the child; and (4) completed the first three elements of the *de facto* doctrine with the consent of the biological or custodial parent.¹⁰²

Additionally, *de facto* parentage often encompasses situations where the substitution of a nonbiological parent in the place of a biological parent is in the best interests of the child.¹⁰³ While a biological parent, adoptive parent, or any caregiver can be considered a *de facto* parent, an absent adult who shows no interest in the child is never considered a *de facto* parent, regardless of the adult's biological or legal relationship to the child.¹⁰⁴

The Wisconsin Supreme Court in *In re H.S.H.-K* was one of the first to apply *de facto* parentage to same-sex couples.¹⁰⁵ The case involved an appellant's petition for custody of, or visitation rights to, the biological child of her former partner.¹⁰⁶ In determining the appellant's rights, the court found that the petition must meet the four elements of a *de facto* relationship.¹⁰⁷ The court noted "the significance of a biological or adoptive parent's consent to permit another adult to establish a parent-child relationship with a child."¹⁰⁸ While the court dismissed the appellant's petition for custody, it reversed the order dismissing the petition for visitation rights and remanded the case to the trial court to determine whether a *de facto* relationship existed.¹⁰⁹ Missouri has not yet adopted a *de facto* parenting standard.¹¹⁰

99. *Id.* at 188.

100. *Id.* at 202.

101. *Id.* at 188.

102. *In re H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995).

103. *See* Cotton v. Wise, 977 S.W.2d 263, 264 (Mo. 1998).

104. *In re Phillip B.*, 188 Cal. Rptr. 781, 789 (Cal. Ct. App. 1983).

105. *H.S.H.-K.*, 533 N.W.2d 419.

106. *Id.* at 420.

107. *Id.* at 435-36.

108. *Id.* at 437.

109. *Id.*

110. *See* White v. White, 293 S.W.3d 1, 15 & n.8 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

2. *In Loco Parentis*

The doctrine of *in loco parentis*, meaning “in the place of a parent,” is another theory under which third parties can assert parental and custodial rights.¹¹¹ It has been more widely accepted by states than *de facto* parentage because stepparents have often used it to assert parentage.¹¹² *In loco parentis* is similar to *de facto* parentage in that a party asserts that although he or she is not the adoptive or biological parent of a child, he or she is acting as the parent and should be given the same legal rights.¹¹³ However, *de facto* parentage is based primarily upon the existence of a psychological relationship between the nonbiological parent and child,¹¹⁴ whereas *in loco parentis* is based upon whether the individual intentionally assumes parental status.¹¹⁵

The doctrine falls within the policies of the Uniform Marriage and Divorce Act (UMDA) in that it seeks to benefit children by promoting marriage and a family unit, as well as by alleviating some of the harm created by separation and divorce.¹¹⁶ *In loco parentis* promotes bonding between children and nonbiological parents because it gives both parties the ability to create permanent, lasting, and loving relationships without the fear that divorce or separation will sever those ties.¹¹⁷ Furthermore, children are less likely to suffer psychological or emotional distress in a divorce because under this doctrine the *in loco* parent has the opportunity to continue a relationship with the child.¹¹⁸

Missouri courts determine whether a stepparent stands *in loco parentis* by analyzing the manner in which the children are treated. The Missouri Court of Appeals, Eastern District stated in *In re Stevens' Estate* that if the stepparent

holds them out to the world as members of his family, he stands in loco parentis and incurs the same liability with respect to them that

111. See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 32 (N.Y. 1991) (per curiam).

112. See Bryce Levine, Note, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315, 347-48 (1996).

113. Delaney, *supra* note 98, at 194.

114. *Id.* at 202.

115. *Alison D.*, 572 N.E.2d at 32.

116. Levine, *supra* note 112, at 347-48 (citing UNIF. MARRIAGE AND DIVORCE ACT § 102 (amended 1988)).

117. *Id.* at 348.

118. *Id.*

he is under to his own children, and the presumption in such case is that they deal with each other as parent and child.¹¹⁹

However, *in loco parentis* has not yet been applied to a case involving a same-sex couple in Missouri.¹²⁰

It is also significant to note that a Missouri statute now supersedes earlier case law stating that a stepparent had no obligation to support a stepchild, but could choose to do so.¹²¹ Missouri Revised Statutes section 453.400 now requires the stepparent to support the stepchild as long as they live in the same house.¹²² However, fulfilling the statutory obligation to provide support does not entitle the stepparent to custody of the stepchild, and the obligation ends after the stepparent and child no longer live in the same house.¹²³

3. Equitable Parenthood

The doctrine of equitable parenthood is a third option by which a third party can assert parental and custodial rights.¹²⁴ Equitable parenthood describes individuals who desire custody and visitation rights to a child, even though they do not satisfy the legal definition of “parent.”¹²⁵ Under the equitable parenthood doctrine, courts allow a parent to adopt a child even though the adult failed to complete the adoption process, generally because courts prevented the adult from adopting, like in cases involving same-sex parents or neglect.¹²⁶ In exchange for the rights to legal parenthood, these individuals are willing to accept the responsibilities of supporting and caring for the child.¹²⁷

119. 116 S.W.2d 527, 531 (Mo. Ct. App. 1938), *superseded by statute*, MO. REV. STAT. § 453.400 (2000), *as recognized in* *White v. White*, 293 S.W.3d 1, 15-16 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

120. *See White*, 293 S.W.3d at 15-16 (doctrine applied to stepparent relationships).

121. MO. REV. STAT. § 453.400.1; *White*, 293 S.W.3d at 15-16.

122. MO. REV. STAT. § 453.400.1 states:

A stepparent shall support his or her stepchild to the same extent that a natural or adoptive parent is required to support his or her child so long as the stepchild is living in the same home as the stepparent. However, nothing in the section shall be construed as abrogating or in any way diminishing the duty a parent otherwise would have to provide child support . . .

123. MO. REV. STAT. § 453.400.1, .4.

124. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE* 163-67 (3d ed. 2007). In this section, “equitable parenthood,” “equitable parent,” and “equitable parentage” are used interchangeably.

125. Delaney, *supra* note 98, at 201-02.

126. ABRAMS & RAMSEY, *supra* note 124, at 636-37.

127. Delaney, *supra* note 98, at 201-02.

Equitable parenthood is founded on the contractual legal theories of equitable estoppel and equitable adoption.¹²⁸ The doctrine of equitable estoppel states that a person may be prevented from asserting a right that he otherwise would have possessed because others relied on his prior inconsistent conduct, such as initially promising to help support and raise a child, thereby encouraging the other parent to have the child in reliance on this support, but later relinquishing this assurance.¹²⁹ This has been used in the family court context to prevent fathers from denying paternity in order to evade paying child support.¹³⁰ Equitable adoption applies when an oral contract to adopt a child is completely fulfilled.¹³¹ Although this does not comply with the adoption statute, which states that such a contract must be written, the child is still deemed adopted for inheritance purposes.¹³²

Equitable parenthood was first utilized in the Michigan case of *Atkinson v. Atkinson*, where a husband, who was not the biological father of a child born during his marriage, sought custody rights because he and the mother of the child were divorcing.¹³³ The mother established the non-paternity of the father through blood testing and claimed that since he was not the biological father of the child, he lacked all rights to custody.¹³⁴ The court then considered whether the father was an equitable parent, meaning an individual who helps provide the physical, emotional, and social needs of a child.¹³⁵ The court determined that in order for the father to gain equitable status, he was required to meet three factors: (1) the father and son must recognize their relationship with one another or the mother must have helped foster this relationship prior to the filing for divorce; (2) the father must desire parental rights; and (3) the father must be willing to pay child support.¹³⁶ After analyzing these elements, the court found that the husband qualified as an equitable parent.¹³⁷ The court then remanded the case to the trial court to determine custody and visitation rights.¹³⁸

Other states have used the doctrine of equitable parenthood to establish parental rights in a similar way.¹³⁹ Before utilizing the theory to allow a non-parent the rights of a legal parent, other states applied the theory to find that a partner was estopped from denying his obligation to support a child because

128. *Id.* at 202.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. 408 N.W.2d 516, 520 (Mich. Ct. App. 1987); *see also* Delaney, *supra* note 98, at 205.

134. *Atkinson*, 408 N.W.2d at 517.

135. *Id.* at 518.

136. *Id.* at 519.

137. *Id.*

138. *Id.*

139. ABRAMS & RAMSEY, *supra* note 124, at 163.

the partner had made “prior claims of entitlement to custody and visitation.”¹⁴⁰ Through the equitable parentage doctrine, the other party can seek a declaration of the partner’s maternity, custody, or obligation to provide support. Currently, more than half of the states acknowledge equitable parentage.¹⁴¹

In re T.L. was the first case where a Missouri court recognized the equitable parent doctrine.¹⁴² The case involved a woman seeking custody of her former lesbian partner’s child after their break up.¹⁴³ In the case, the court stated, “Social fragmentation and the myriad configurations of the modern family present courts with new problems. . . . Courts must recognize that custody and visitation disputes no longer occur only between heterosexual couples.”¹⁴⁴ The court adopted the doctrine of “equitable parent” and analyzed the elements listed in *Atkinson*.¹⁴⁵ From this analysis, the court determined that the homosexual partner qualified as an equitable parent.¹⁴⁶

The court then determined that the biological parent’s right to custody must be balanced with the state’s interest in the child’s welfare and, as such, the biological parent’s right might be outweighed by another’s interest in custody.¹⁴⁷ The court next applied the “actual detriment to the child” test, since it found the “best interests” test did not fully serve the biological parent’s rights and the “parental unfitness” test did not adequately protect the child.¹⁴⁸ Additionally, the court stated that although the child might be discriminated against for having two mothers, the court cannot deprive the partner of rights “simply because she pursues a life-style at odds with the norm.”¹⁴⁹ As a result, the court awarded the partner custody rights.¹⁵⁰

Although *In re T.L.* appears groundbreaking because a Missouri court accepted the equitable parentage doctrine, the decision was not binding precedent for other custody and visitation cases because it was a circuit court

140. *White v. White*, 293 S.W.3d 1, 17 n.11 (citing *Chambers v. Chambers*, No. CN99-09493, 2005 WL 645220, at *7 (Del. Fam. Ct. Jan.12, 2005); *L.S.K. v. H.A.N.*, 813 A.2d 872, 877-78 (Pa. Super. Ct. 2002)), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

141. ABRAMS & RAMSEY, *supra* note 124, at 636.

142. *In re T.L.*, No. 953-2340, 1996 WL 393521, at *2 (Mo. Cir. Ct. May 7, 1996); Heather Bueth, Note, *Second Parent Adoption and the Equitable Parent Adoption: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri*, 20 WASH. U. J.L. & POL’Y 283, 303 (2006).

143. *T.L.*, 1996 WL 393521, at *1.

144. *Id.* at *2.

145. *Id.*

146. *Id.*

147. *Id.* at *3.

148. *Id.*

149. *Id.* at *3-4.

150. *Id.* at *5.

case and the parties agreed upon the terms of custody.¹⁵¹ As a result, its impact has been limited.

Additional Missouri courts have been reluctant to apply the equitable parentage doctrine.¹⁵² For example, in *Cotton v. Wise*, a trial court granted the placement of two minor children in the custody of their adult half sister, rather than their biological father, after their mother's death.¹⁵³ The father, who formerly physically abused his daughters and their mother and owed more than \$11,000 in back child support, contested the custody arrangement.¹⁵⁴ The sister claimed custody under the equitable parent doctrine, and the trial court granted custody to the sister under this theory.¹⁵⁵ However, the Supreme Court of Missouri reversed and remanded the trial court's decision because the supreme court declined to recognize the equitable parent doctrine, stating that "[t]he problem with a court-fashioned 'equitable parent' doctrine is that the court has to improvise, as it goes along, substantive standards and procedural rules about . . . matters that already have well-charted passageways under state statutes and related court decisions."¹⁵⁶ As a result, the court determined that the state should have held a hearing before finding that the natural father was without custody rights because a natural parent is automatically presumed to be the appropriate custodian.¹⁵⁷ This notion can only be overcome by evidence that the parent is unfit, unable, or unwilling to care for the child.¹⁵⁸ In accord with *Cotton*, the Missouri Court of Appeals, Eastern District in *Jefferson v. Jefferson* also determined that the equitable parent doctrine is not applicable in Missouri since the legislature has not enacted analogous legislation.¹⁵⁹

151. *White v. White*, 293 S.W.3d 1, 14 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

152. *See Jefferson v. Jefferson*, 137 S.W.3d 510, 515 (Mo. App. E.D. 2004); *see also White*, 293 S.W.3d at 14 n.7.

153. 977 S.W.2d 263, 263-64 (Mo. 1998).

154. *Id.* at 263.

155. *Id.* at 264.

156. *Id.* at 265.

157. *Id.* at 264-65.

158. *Id.* at 264.

159. 137 S.W.3d 510, 514 (Mo. App. E.D. 2004).

IV. INSTANT DECISION

In *White v. White*, the Missouri Court of Appeals, Western District affirmed the dismissal of Leslea's petition for declaration of maternity, order of custody, and order of child support.¹⁶⁰ Judge Ellis wrote the majority opinion, Judge Howard concurred in the decision, and Judge Ahuja concurred in part and dissented in part in a separate opinion.¹⁶¹

A. Majority Opinion

First, the court examined the issue of standing under the MoUPA.¹⁶² Leslea argued that she and the children had standing under MoUPA section 210.826.2 to create a legally recognized mother-child relationship because she is the legal and biological mother of Z.A.W., formerly held physical custody of C.E.W. for more than four years, and considers herself the mother of C.E.W.¹⁶³ The court rejected this argument, stating that each child already has a mother because Michelle is the biological mother of C.E.W. and Leslea is the biological mother of Z.A.W.¹⁶⁴

The court went on to say that the identity of each child's natural and presumed mother is already known.¹⁶⁵ The court determined that because the statute does not allow for more than one legal mother per child, neither Leslea nor the children could bring a claim to establish a mother-child relationship under MoUPA section 210.826.2.¹⁶⁶ The court reasoned that swapping the word "mother" in the place of "father" in MoUPA section 210.826.2 would not make sense because if a child had no mother, the action to determine the existence of the mother could not be brought by the mother.¹⁶⁷ As a result, the court found that MoUPA section 210.826.2 could not apply in this situation.¹⁶⁸

Second, Leslea argued that she had standing under MoUPA section 210.848, which allows "any interested party" to file an action to determine

160. 293 S.W.3d 1, 6 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

161. *Id.* at 6, 25.

162. *Id.* at 8.

163. *Id.* at 9; *see* MO. REV. STAT. § 210.826.2 (2000); *see also supra* notes 73-76 and accompanying text. Additionally, she stated that the children had standing under the statute because they have no presumed father. *White*, 293 S.W.3d at 9.

164. *White*, 293 S.W.3d at 9.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

whether a mother-child relationship exists.¹⁶⁹ Leslea argued that she qualified as an interested party since she acted as C.E.W.'s mother and wanted to establish her legal right as such.¹⁷⁰ Furthermore, she noted that interpreting the statute as applicable only to biological parents works against its meaning and prevents the intended effect of the statute.¹⁷¹ Additionally, Leslea argued that other state courts, such as the Rhode Island Supreme Court in *Rubano v. DiCenzo*, interpreted the analogous provision in the UPA as applicable to nonbiological parents.¹⁷²

The court also rejected this argument, finding that Missouri's statutory scheme is different from that of Rhode Island, since Missouri adopted the UPA almost completely while Rhode Island only adopted about a third of it.¹⁷³ Furthermore, the court found that Missouri's statutes are already determinative on the issue, without looking to the UPA, because the MoUPA states that an interested party does not need to have a biological relationship to the child, but the action to declare parentage must be to declare a biological relationship.¹⁷⁴ Thus, the court found that "the MoUPA only allows claims for declaration of a parent-child relationship based on a biological tie or a presumption due to a marriage or attempted marriage."¹⁷⁵ The court noted that because Leslea and the children could not petition for the declaration of a biological relationship and because none of the parental assumptions applied, Leslea, Z.W.A., and C.E.W. lacked standing under the MoUPA.¹⁷⁶

Leslea then asserted that she maintained standing under three equitable parent doctrines that are recognized in Missouri: (1) a *de facto* parentage claim, (2) standing *in loco parentis* to Michelle's biological daughter C.E.W., and (3) equitable estoppel.¹⁷⁷ Michelle, in response, claimed the MoUPA was the sole means of establishing parentage in Missouri, and thus none of the other theories or doctrines could be considered.¹⁷⁸ After examining the case history in Missouri, the court determined that the MoUPA is not the only way of establishing parentage in Missouri and that other ways could be considered, such as statutes or equitable proceedings drafted outside of the MoUPA.¹⁷⁹ However, the *White* court, relying on *In re Marriage of Fry*, determined that the procedural requirements of the MoUPA should be applied

169. *Id.*; MO. REV. STAT. § 210.848 (2000); see *supra* notes 92-96 and accompanying text.

170. *White*, 293 S.W.3d at 9-10.

171. *Id.* at 10.

172. *Id.* (citing *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000)).

173. *Id.*

174. *Id.* at 10-11.

175. *Id.* at 11.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 12 (discussing *In re Nocita*, 914 S.W.2d 358, 359 (Mo. 1996) (en banc); *State ex rel. Illinois v. Schaumann*, 918 S.W.2d 393, 397 (Mo. App. E.D.

when parentage is in question and if, outside of the MoUPA, no other statute or provision applies.¹⁸⁰ The court in *White* then concluded that there were no alternatives to the MoUPA in this situation and, thus, that the MoUPA should be applied.¹⁸¹

Leslea's first argument in favor of standing was that the trial court erred in "apply[ing] common law and equitable principles to safeguard the best interests of children raised in diverse family structures."¹⁸² The Western District denied this argument outright because it did not comply with Missouri Supreme Court Rule 84.04(d)(1), which requires legal reasons that support the appellant's claim of reversible error, and was "nothing more than an abstract statement of the law, which is unacceptable."¹⁸³ Thus, the court found that because this was a general policy argument that did not identify explicit reasons to support a claim of reversible error, it failed without further review.¹⁸⁴

Leslea's next standing argument claimed that she is the *de facto* parent of C.E.W. and Michelle is the *de facto* parent of Z.A.W.¹⁸⁵ To this end, she

1996); *Washington ex rel. Lewis v. Collis*, 963 S.W.2d 700, 702-03 (Mo. App. W.D. 1998); *LeSage v. Dirt Cheap Cigarettes & Beer, Inc.*, 102 S.W.3d 1, 4 (Mo. 2003) (en banc)).

180. *White*, 293 S.W.3d at 12-13 (quoting *In re Marriage of Fry*, 108 S.W.3d 132, 136-37 (Mo. App. S.D. 2003); see also *supra* notes 79-91 and accompanying text.

181. *White*, 293 S.W.3d at 13.

182. *Id.*

183. *Id.* The court explained:

Rule 84.04(d) provides, in pertinent part:

(1) Where the appellate court reviews the decision of a trial court, each point shall:

(A) identify the trial court ruling or action that the appellant challenges;
(B) state concisely the legal reasons for the appellant's claim of reversible error; and

(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The trial court erred in [identify the challenged ruling or action], because [state the legal reasons for the claim of reversible error], in that [explain why the legal reasons, in the context of the case, support the claim of reversible error]."

Thus, the rule requires that a proper point relied on must: (1) identify the ruling or action of the trial court that is being challenged on appeal; (2) state the legal reason or reasons for the claim of reversible error; and (3) explain in summary fashion why, in the context of the case, the legal reason or reasons support the claim of reversible error. Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that appellate courts do not become advocates by speculating on facts and on arguments that have not been made.

Id.

184. *Id.* at 14.

185. *Id.*

argued that “‘it is in the child’s best interest to maintain his or her relationship with a person who, in all respects but genetics, is the child’s parent.’”¹⁸⁶ In support, she claimed that *In re T.L.* recognized the concept of an “equitable parent.”¹⁸⁷ She also cited *In re H.S.H.-K.*, which listed the four elements of a *de facto* parenting relationship that Leslea claimed she and Michelle met.¹⁸⁸ However, the court rejected Leslea’s arguments regarding both of the analogous cases she listed.¹⁸⁹ The court claimed the principles of *In re T.L.* could not be applied because the judgment did not hold precedential value.¹⁹⁰ The court rejected the argument from *In re H.S.H.-K.* because it was a Wisconsin judgment that no Missouri court had followed.¹⁹¹ Ultimately, the court found that Leslea did not have standing as an equitable or a *de facto* parent.¹⁹²

Next, the court examined Leslea’s argument that she stood *in loco parentis* to Michelle’s child, C.E.W., and that Michelle stood *in loco parentis* to Leslea’s child, Z.A.W.¹⁹³ Relying upon *In re Stevens’ Estate*, Leslea argued that she and Michelle qualified under *in loco parentis* “because they jointly raised the children with each other’s consent, and treated each child, and held each child out to the world, as the children of both of them.”¹⁹⁴ The court also rejected this argument, finding that the holding of *In re Stevens’ Estate* had since been replaced by Missouri Revised Statutes section 453.400.1, stating that a stepparent’s obligation to support the stepchild would terminate once the stepchild stopped living with the stepparent.¹⁹⁵ The court went on to find that even if it considered Leslea as *in loco parentis* to C.E.W. while they lived together, that status ended after the couple separated.¹⁹⁶

The court next considered Leslea’s argument that Michelle should be equitably estopped from ending the relationship between Leslea and C.E.W. because she initially helped create and nourish that relationship.¹⁹⁷ The court found that this argument failed because equitable estoppel is a defense, rather

186. *Id.* (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1)(c) (2003)).

187. *Id.*; see *In re T.L.*, No. 953-2340, 1996 WL 393521 (Mo. Cir. Ct. May 7, 1996); see also notes 142-51 and accompanying text.

188. *White*, 293 S.W.3d at 14-15; see *In re H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1994); see also notes 105-09 and accompanying text.

189. *White*, 293 S.W.3d at 14-15.

190. *Id.* at 14.

191. *Id.* at 14-15.

192. *Id.*

193. *Id.* at 15.

194. *Id.*; see *In re Stevens’ Estate*, 116 S.W.2d 527 (Mo. Ct. App. 1938), *super-seded by statute*, MO. REV. STAT. § 453.400 (2000), *as recognized in White v. White*, 293 S.W.3d 1, 15-16 (Mo. App. W.D. 2009), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

195. *White*, 293 S.W.3d at 15-16; see *supra* notes 119-23 and accompanying text.

196. *White*, 293 S.W.3d at 16.

197. *Id.*

than a legal basis for establishing a parental relationship.¹⁹⁸ Michelle never refuted any of the information in Leslea's original petition.¹⁹⁹ Rather, Michelle argued that even if all of it were true, there was no legal cause of action.²⁰⁰ Thus, the court found that the issue consisted of "Leslea's inability to articulate a recognized legal basis in the posture of this case for her action," rather than a claim under equitable estoppel.²⁰¹

The court then considered Leslea's claim that the case qualified as an exceptional circumstance that warranted third-party custody or visitation rights even if the biological parent was fit.²⁰² Although the court determined that Leslea's situation did qualify as an exceptional circumstance, it found the analysis must go further because "[n]either our statutes nor our case law remotely suggest that any third party that comes along has standing to bring an action seeking custody of children."²⁰³ Additionally, the court did not find, nor had Leslea presented, any cases involving a third-party custody arrangement in which the third party had not already intervened in earlier litigation or where the third party had not been named as a party in the first custody case.²⁰⁴

As a result, the court found that Missouri case law provided that a third party's right to custody or visitation was first dependent upon (1) the third party being involved as a named party in litigation involving someone else, (2) the court allowing the party to intervene in a pending action, (3) and the third party already having an arrangement other than *de facto* custody.²⁰⁵ Since Leslea did not fall within any of these categories, the court determined that she failed to qualify under the exceptional circumstances doctrine.²⁰⁶ Therefore, the Western District found that none of Leslea's arguments regarding standing prevailed.²⁰⁷

The court then examined Leslea's argument that she was entitled to child support because of the "express contractual assumption" (the term used by the court) made by each woman to support the other's biological children.²⁰⁸ The court dismissed this theory because they found that Leslea's petition failed to state a claim for such relief, and thus it was not preserved for appeal.²⁰⁹ Although the court entertained the idea that the women could have entered into a contract to provide support to each other's biological child, the

198. *Id.*

199. *Id.* at 17.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 17-18.

204. *Id.* at 18.

205. *Id.* at 21.

206. *Id.*

207. *Id.*

208. *Id.* at 22; *see supra* notes 11-14 and accompanying text.

209. *White*, 293 S.W.3d at 22-23.

court ultimately ruled that the breach of contract argument still would have failed because the parties did not agree upon a length of time for the support to continue.²¹⁰ As a result, the court could not determine whether Michelle failed to provide the support outlined in the agreement. Since Leslea was unsuccessful in evidencing every element of the claim for breach of contract and because the court determined that she never actually pleaded an express contract theory as a basis for child support in her original petition, the court denied her claim for breach of contract.²¹¹

The court then considered Leslea's final argument concerning violations of due process and equal protection under the state and federal constitutions.²¹² Leslea claimed that she was denied procedural due process because the court denied her petition without giving her a chance to demonstrate the mother-child relationships that would receive protection under Missouri law.²¹³ The court rejected this claim because multiple hearings were held on Michelle's motion to dismiss the petition in the trial court.²¹⁴ Leslea also asserted that her right to equal protection was violated due to her sexual orientation, parental legitimacy, and/or sex.²¹⁵ The court quickly denied this claim, stating that no merit to her claim existed because, as stated above, she lacked standing under the MoUPA and other parental doctrines.²¹⁶ In addition, the court found the claim was "not based on legitimacy, sexual orientation, and/or sex."²¹⁷

Lastly, Leslea claimed that the trial court violated Missouri's "open courts guarantee," since she was unable to assert legal protection to preserve her familial relationships.²¹⁸ The Missouri Constitution's open courts provision allows a person with a legitimate claim recognized by substantive law access to the courts when a procedural bar stands in the way.²¹⁹ The court

210. *Id.* at 23.

211. *Id.*

212. *Id.* at 23-24.

213. *Id.* at 24.

214. *Id.*

215. *Id.* at 25.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* (citing *Mo. Highway & Transp. Comm'n v. Merritt*, 204 S.W.3d 278, 285 (Mo. App. E.D. 2006)) ("The 'open courts' provision of the Missouri constitution, Article I, Section 14, 'permits the pursuit in Missouri courts of causes of action recognized in substantive law' and 'applies only to judicial or legislative acts that impose procedural bars to access to Missouri courts.' 'The open-courts provision was not designed to create rights, but only to allow a person claiming those rights access to the courts when such a person has a legitimate claim recognized by the law.' 'An open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.' (citations omitted)); *see* MO. CONST. art. I, § 14.

found this argument, like Leslea's two federal constitutional arguments, lacking merit because she had no recognizable cause of action, which is the first element of an open courts violation.²²⁰

The Western District affirmed the trial court's judgment and dismissed Leslea's petition because it determined that (1) she lacked standing under the MoUPA, the equitable parent doctrines, and equitable estoppel; (2) her claim did not fall under the exceptional circumstances exception or a contractual assumption made by the parties; and (3) she had no constitutionally valid claims under due process, equal protection, or the open courts guarantee.²²¹

B. Dissent

Though concurring with the majority in nearly all of Leslea's claims, Judge Ahuja found Leslea's equitable estoppel argument meritorious, which entitled her to seek child support for Z.A.W.²²² Judge Ahuja stated that the majority suggested that Leslea "*should have* invoked" promissory estoppel rather than equitable estoppel.²²³ Regardless, he found that the majority was wrong to make a distinction between the two doctrines because promissory estoppel is a kind of equitable estoppel since "'equitable estoppel' is a broad category 'which encompasses all estoppels arising out of some form of misrepresentation.'"²²⁴ Thus, Judge Ahuja determined that regardless of the term, the estoppel claim was valid.²²⁵ Judge Ahuja determined that Leslea's petition contained a valid estoppel claim because the couple had an agreement, Leslea became impregnated in reliance on this agreement, the parties considered Michelle Z.A.W.'s mother, Z.A.W. needed Michelle's support, and Michelle upheld her part of the agreement until the parties separated.²²⁶

Because he found her estoppel argument to have merit, Judge Ahuja determined that "Leslea's petition [was] minimally sufficient" to support a claim of equitable estoppel; thus, he stated that a fact finder should examine the evidence to determine if the necessary elements were supported.²²⁷ The dissent contrasted this situation with one that involved a stepparent relationship.²²⁸ Judge Ahuja argued that case law was hesitant to force a stepparent to pay child support simply because the stepfather or stepmother acted as the "natural parent," as this would discourage the voluntary support of stepchild-

220. *White*, 293 S.W.3d at 25.

221. *Id.*

222. *Id.* at 25 (Ahuja, J., concurring in part and dissenting in part).

223. *Id.* at 26-27.

224. *Id.*

225. *Id.*

226. *Id.* at 27.

227. *Id.*

228. *Id.* at 27-28.

ren and nonmarital children.²²⁹ While in a stepparent relationship the child has already been created, the dissent determined that Leslea became pregnant *in reliance on* Michelle's promise to help support the child.²³⁰ Accordingly, Judge Ahuja stated that Leslea's claim should be recognized because "a person should not be permitted to make representations or promises on which they know or should know others will rely to their detriment, only to later attempt to escape those commitments scot-free."²³¹

V. COMMENT

A. Social Costs and the Need to Recognize Third-Party Parentage

Approximately ten million children are raised by same-sex parents in the United States.²³² As the number continues to grow, more states have enacted legislation to allow same-sex second-parent adoption.²³³ However, many states, like Missouri, continue to lag behind this "gayby boom"²³⁴ and offer no way for two same-sex parents to both assert parentage. While the parents' relationship continues, this causes little concern. Yet, when gay couples break up, their parental rights are left in limbo.

Without enjoying legal recognition as a parent, a same-sex parent who formerly helped raise a child has virtually no way to claim visitation or custody rights. Additionally, a same-sex parent who is considered the legal parent often cannot assert an entitlement to child support unless he or she can establish that a contract was created between the parents.²³⁵ Thus, states prohibiting adoption by same-sex parents prevent both the parents and the child from assuming a typical relationship following a divorce. This disadvantages and harms the children who were created or adopted during the relationship and formed close bonds with both parents. Regardless of whether they have two same-sex parents or heterosexual parents, children build strong bonds

229. *Id.* at 27.

230. *Id.* at 28.

231. *Id.*

232. Jacobs, *supra* note 3, at 342; Kellogg, *supra* note 3.

233. Jacobs, *supra* note 3, at 344-45 ("More than 20 states have formally recognized second-parent adoption and others have allowed such adoptions in individual cases, without ruling on the practice generally.").

234. *Id.* at 342; accord Ilene Chaykin, *Babes in Arms*, L.A. MAG., July, 2000, at 105; Kellogg, *supra* note 3.

235. Robin Miller, *Child Support Obligations of Former Same Sex Partners*, 5 A.L.R. 6th 303 (2005). Courts often use their discretion to determine whether a former same-sex partner has an obligation to pay child support. *Id.*; see, e.g., T.F. v. B.L., 813 N.E.2d 1244, 1249-50 (Mass. 2004) (while court determined an implied contract existed between the parties, the court held it was unenforceable based on public policy).

with their caretakers.²³⁶ The loss of this “physical and emotional security” can cause a child to suffer from depression, anxiety, or attachment disorder.²³⁷

Even alternative doctrines like *de facto*, *in loco parentis*, and equitable parentage might not put same-sex parents on equal ground with biological parents. For instance, Missouri accepts the status of *in loco parentis*, but only in regard to a stepparent relationship, and a statute has mostly displaced the use of the concept even in this way.²³⁸ Furthermore, *in loco parentis* is considered temporary, since it ends when the non-legal parent ceases to fulfill the parental responsibilities.²³⁹ If two same-sex parents break up and the nonbiological parent wants visitation or custody of the child, like in *White*, then *in loco parentis* offers no help in states like Missouri. As a result, the *de facto* and equitable parentage theories offer the most protection for a nontraditional parent, but these doctrines remain unrecognized by Missouri courts.²⁴⁰ Furthermore, they can also be misused or overlooked by courts.²⁴¹

In this way, the alternative doctrines still qualify as “[p]yrrhic victories for lesbian coparents . . . [because] lesbian coparents still occupy an inferior legal status as compared to their former partners.”²⁴² A “parent-like status” establishes third-party visitation rights, but this still pales to the actual rights given to the biological parent.²⁴³ The constitutional rights of nonbiological

236. Appellants’ Brief, *supra* note 12, at *24 (citing JOHN BOWLBY, ATTACHMENT (1969); DOUGLAS DAVIES, CHILD DEVELOPMENT: A PRACTITIONER’S GUIDE 13 (1999)).

237. *Id.* at *24 (citing Shelley A. Riggs, *Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 FAM. CT. REV. 39, 41-42 (2003)).

238. *White v. White*, 293 S.W.3d 1, 15-16 (Mo. App. W.D. 2009) (citing MO. REV. STAT. § 453.400.1 (2000)), *transfer denied*, No. SC90330, 2009 Mo. LEXIS 474 (Mo. Oct. 6, 2009).

239. *U.S. v. Floyd*, 81 F.3d 1517, 1524 (10th Cir. 1996) (citing *Griego v. Hogan*, 377 P.2d 953, 955-56 (N.M. 1963); BLACK’S LAW DICTIONARY 787 (6th ed. 1990)).

240. *See supra* Part III.C.1, .3.

241. *Jacobs*, *supra* note 3, at 368 (“Because courts have not often recognized a statutory basis upon which lesbian coparents can maintain their claims, they have relied on the equitable principles discussed above both as a mechanism for determining whether the petitioner has standing to bring her claim and to decide the merits of the claim. By conflating the issues of standing and merits, courts do little to clarify the legal process for future petitioners. As noted concerning *E.N.O. v. L.L.M.*, ‘by defining the *de facto* parent standard as an aspect of the substantive best interests analysis, rather than as a procedural standing requirement, the *E.N.O.* court neither explicitly extended nor limited the possible extension of parental standing rights to lesbian coparents.’ The court did not differentiate its standing analysis from its analysis of the merits, leaving unclear the specific circumstances under which a lesbian coparent may petition for custody and visitation with her child.” (footnote omitted)).

242. *Id.* at 367.

243. *Id.*

parents have yet to be clarified by the United States Supreme Court.²⁴⁴ As previously stated, courts often look to the “genetic bond of parenthood” first in order to determine custody rights and parentage.²⁴⁵

B. The Historical Emphasis on Biological Connections

Why would the courts still choose to determine parentage by biology? It could be a backlash against the declining rate of successful marriages, the decrease in the number of marriages, and the increase in same-sex parentage. As a result, “[p]erhaps because the law no longer attempts to uphold the sanctity of marriage, and there are no longer clear-cut presumptions to determine custody, the biological fact of parenthood is looked on with ever greater favor.”²⁴⁶

The importance of biology to the courts is backed by ample support. For instance, in *In re Baby M.*, a couple paid a surrogate \$10,000 to be artificially inseminated with the man’s sperm since his wife was unable to have a child.²⁴⁷ The parties executed a surrogacy contract that stated the wife was to adopt the child and the couple would be the legal parents of the child for all purposes.²⁴⁸ The surrogate later decided that she could not live without the baby, and the couple commenced custody proceedings.²⁴⁹ Ultimately, the New Jersey Supreme Court “invalidat[ed] the surrogacy contract because it conflict[ed] with the law and public policy of this State.”²⁵⁰ Furthermore, the court stated, “There are, in a civilized society, some things that money cannot buy.”²⁵¹ Although the court awarded custody to the biological father, the court also restored the surrogate mother as the mother of the child and remanded the case to the trial court to determine the biological mother’s custody rights.²⁵²

Other states have statutes that provide merely carrying a baby entails legal rights to parentage, even if the surrogate mother has no biological relation to the child and never intended to parent the child.²⁵³ In 2009, for example, a surrogate mother in Michigan contested the adoption of the children she car-

244. Schuster, *supra* note 56, at 569.

245. *Id.*

246. *Id.*

247. 537 A.2d 1227, 1235 (N.J. 1988), *superseded by statute*, N.J. STAT. ANN. § 9:3-46 (West 2010), *as recognized in In re Adoption of Children by G.P.B.*, 736 A.2d 1277, 1285-86 (N.J. 1999).

248. *Id.*

249. *Id.* at 1236-37.

250. *Id.* at 1234.

251. *Id.* at 1249.

252. *Id.* at 1234-35.

253. Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at A1, *available at* <http://www.nytimes.com/2009/12/13/us/13surrogacy.html>.

ried by the potential adoptive parents who had planned for the children's existence after finding that the potential adoptive mother suffered from schizophrenia, even though it was completely controlled for eight years prior to the birth of the babies.²⁵⁴ The surrogate had no biological relationship to the children since they were created through an egg and sperm donor.²⁵⁵ However, the court ordered the two adoptive parents to return their twin babies to the surrogate mother who carried them.²⁵⁶ In this way, courts have demonstrated that physical ties trump parental bonds established through other ways, including assisted reproductive technologies.

C. Solutions for the Modern Family and the Policy Implications of Recognizing Alternative Parentage

The alternative doctrines still might not place a same-sex partner with no biological tie to a child on an equal level with a biological parent in the court's view. However, these alternative doctrines would be an improvement over Missouri's current parentage scheme. Second-parent adoptions would offer another way for same-sex couples to assert legal parentage. Through this mechanism, two same-sex parents can be named the legal parents of a child, which "protects the rights of the co-parents, by ensuring that the co-parent will continue to have a legally recognized parental relationship to the child if the couple separates or if the biological parent (or original adoptive parent) dies or becomes incapacitated."²⁵⁷

Only nine states and the District of Columbia have approved second-parent adoptions in all counties statewide.²⁵⁸ Although some jurisdictions allow second parent adoptions by broadly reading state adoption statutes, other jurisdictions, like Missouri, prevent second-parent adoptions by interpreting the adoption statute narrowly to only allow for one parent of each sex to be named as a legal parent of a child.²⁵⁹ In order to end this outdated interpretation and allow both same-sex partners legal parentage in Missouri, the legislature should enact a statute that allows second-parent adoptions. Missouri should also acknowledge the alternative legal parent doctrines with regard to same-sex parentage. As previously discussed, such doctrines might not be as powerful as second-parent adoptions. However, they allow the court to resolve a conflict by giving legal parentage to same-sex individuals

254. *Id.*

255. *Id.*

256. *Id.*

257. Buethe, *supra* note 142, at 294 (internal quotation marks omitted).

258. The Human Rights Campaign, Second-Parent Adoption, <http://www.hrc.org/issues/parenting/adoptions/2385.htm> (last visited Oct. 7, 2010) ("Nine states and the District of Columbia have approved second-parent adoption for lesbian and gay parents . . . These states include: California, Colorado, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, [and] Vermont.").

259. *Id.*; Buethe, *supra* note 142, at 294.

when they did not undergo a “second-parent” adoption. Couples often do not consider the fact that they might break up when they have a child. After same-sex couples break up and one parent asserts full custody rights, the other parent has no legal remedy or leverage. Alternative parentage doctrines would allow them this opportunity.

Courts that have accepted these alternative doctrines have done so in order to “serve the best interest[s] of the child” while still “protect[ing] parental autonomy.”²⁶⁰ Despite the backlash from some states, and attempts to preserve marriage and the biological bond between parents and children,²⁶¹ many states are beginning to allow nonparents visitations with children if it is in the “best interests of the child.”²⁶² Similarly, Missouri has always sought to protect “the best interest[s] of the child,”²⁶³ which is why it should protect the children of same-sex parents.

Although Missouri has not legalized gay marriage, it should be willing to enact mechanisms to protect children with same-sex parents. By doing this, the state does not necessarily support homosexual relationships. Rather, the state entitles the children of same-sex parents to have two legal parents. Research demonstrates that children with joint custody arrangements are more satisfied with the separation arrangement and adjust better to the situation.²⁶⁴ Children benefit financially by having two legal parents through eligibility under both parents’ health insurance, benefits from life insurance, and inheriting assets from two legal parents.²⁶⁵ Additionally, children benefit

260. *In re H.S.H.-K.*, 533 N.W.2d 419, 435 (Wis. 1995).

261. *See, e.g., In re Marriage of Freel*, 448 N.W.2d 26 (Iowa 1989) (refusing to grant visitation to former girlfriend, despite recognizing that the relationship with the child was “strong indeed” and that “the equities strongly favor [visitation]”); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (per curiam) (“[I]n this state it is the child’s mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents’ consent.”); *Cooper v. Merkel*, 470 N.W.2d 253, 255-56 (S.D. 1991) (“[I]n order to grant a nonparent visitation rights with a minor child over the wishes of a parent, a clear showing against the parent of gross misconduct, unfitness or other extraordinary circumstances affecting the welfare of the child is required.”).

262. *See, e.g., In re Hiren C.*, 22 Cal. Rptr. 2d 443 (Cal. Ct. App. 1993); *In re Robin N.*, 9 Cal. Rptr. 2d 512, 516 (Cal. Ct. App. 1992); *In re Francisco A.*, 866 P.2d 1175, 1180 (N.M. Ct. App. 1993).

263. “The best interests of the child” is included in the MoUPA. MO. REV. STAT. § 210.838 (2000).

264. Robert Bauserman, *Child Adjustment in Joint Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 97 (2002); Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL. 119, 130-31 (1988).

265. *See In re Jacob*, 660 N.E.2d 397, 399 (N.Y. 1995) (the court considered the fact that children benefit financially from having two parents and allowed a second-parent adoption because it was in the “best interests of the child”).

from having two legal parents to make emergency medical decisions.²⁶⁶ Furthermore, having two legal parents offers security for the child and prevents a battle over legal parenthood after a separation, as illustrated in *White*. By disallowing same-sex parentage, Missouri discriminates not only against homosexuals, but also against the children of same-sex relationships.

Some argue that the *in loco parentis* and *de facto* parent doctrines are a “slippery slope” that could “lead to situations in which someone like a child’s day-care provider asks for visitation.”²⁶⁷ However, this is a far-fetched idea that skews the true purpose of the doctrines. The alternative schemes adopted by the UPA specifically analyze the type of relationship between the child and parent.²⁶⁸ One author argues that “a genetic link is stronger than a non-genetic link and that the genetic link goes beyond the love that a parent shows a child.”²⁶⁹ While a genetic link may result in similar DNA and physical characteristics, it seems absurd that children be torn from the parents that helped raise and nurture them simply because they do not share the same biology. Plus, all states now allow adoption.²⁷⁰ One of the primary reasons behind this development was protecting the well being of the adoptive child, rather than protecting “adoptive children as chattel of their natural parents.”²⁷¹ This further indicates acceptance of the fact that nonbiologically related parents and children have the same love and bond with one another as biologically related parents and children. The Missouri legislature should bear this in mind when considering stronger third-party parentage legislation.

Furthermore, “biology may mean less in a family in which the child is the product of some form of alternative insemination and in which the genetic connection may not correlate, even loosely, with the provision of day-to-day care for the growing child.”²⁷² In *White*, Leslea never refused to consider C.E.W. her child simply because they lacked a biological relation. Rather, she based her parentage on the fact that she considered C.E.W. her own and helped raise her as a part of a family. Some courts have determined that these actions trump a biological relationship that lacks meaning beyond genetics.²⁷³

266. See, e.g., *id.*

267. Rohlf, *supra* note 1, at 718.

268. UNIF. PARENTAGE ACT §§ 102(14), 201 (amended 2002).

269. Rohlf, *supra* note 1, at 722.

270. ABRAMS & RAMSEY, *supra* note 124, at 619.

271. Carolyn J. Campbell, *Current Developments in the Law: A Survey of Recent Cases Affecting the Rights of Gays, Lesbians and Bisexuals*, 3 B.U. PUB. INT. L.J. 379, 407 (1993).

272. Jacobs, *supra* note 3, at 348 (quoting William B. Rubenstein, Development, *Divided We Propagate: An Introduction to Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 UCLA WOMEN’S L.J. 143, 146 (1999)).

273. See, e.g., *In re Ariel H.*, 86 Cal. Rptr. 2d 125 (Cal. Ct. App. 1999) (“[T]o be declared a presumed father he must first show he has assumed parental responsibilities for the minor. A parent, by definition, is someone who protects, guards, and nurtures a child, physically and emotionally.”).

Missouri should do the same in order to continue to focus on the most important factor – the best interests of the child.

VI. CONCLUSION

So, who qualifies as a parent? Instead of relying on history or the current legal scheme, perhaps courts should look to a simple Dr. Seuss story, *Horton Hatches the Egg*:

Remember Horton the elephant? One day he stumbles upon Mayzie, a bird who has no interest in hatching her egg. After coaxing Horton to mount a tree and sit upon her nest, she vanishes. As events unfold in Dr. Seuss's whimsical *Horton Hatches the Egg*, Horton sits resolutely, unbudged by jeers, inclement weather or nasty humans, who cart him off, tree and all, to be a sideshow in a circus. When Mayzie happens by Horton's tent and sees that most of the work is done, she demands her egg back. Just then, the egg cracks open and out pops a tiny elephant with wings. Horton triumphantly returns home to cheers with his baby. It's perfectly clear to all (save Mayzie) who the real parent is.²⁷⁴

In a similar fashion, Missouri should recognize the “real parents” in a child's life by granting legal parentage to both same-sex parents. The intended parent, who influenced another person to create a child, based on a promise to partake in the child's upbringing and welfare, and then subsequently upheld this promise and helped raise the child, should be given the same legal rights as the parent biologically related to the child. Missouri can use various mechanisms to enforce these rights, including *de facto* parenthood, *in loco parentis*, and equitable parentage. Additionally, Missouri should legalize second-parent adoptions throughout the state. Missouri's current laws and the decision in *White* cripple the rights of same-sex parents and do little more than victimize their children.

274. *Id.* at 75 (quoting Jill Smolowe, *Baby Knows Best: Parenthood is Made of More Than Genetic Material*, TIME, Aug. 17, 1998, at 66).